

SHIPPED: 7-11-63, from Tampa, Fla., by Star Terminal & Warehouse.

LABEL IN PART: (Bag) "Topeka, Indiana * * * Kind of Popcorn: Yellow."

LIBELED: 8-5-63, N. Dist. Ga.

CHARGE: 402(a)(3)—contained insects and insect parts when shipped and while held for sale.

DISPOSITION: 9-11-63. Default—ordered destroyed or delivered to a Government institution for use as animal feed.

CONFECTIONERY

29130. Delson thin mints. (F.D.C. No. 42799. S. No. 32-538 P.)

QUANTITY: 174 cases, each containing 24 10-oz. pkgs., at Carlstadt, N.J.

SHIPPED: Between 5-9-58 and 6-13-58, from New York, N.Y., by Delson Candy Co.

LABEL IN PART: (Pkg.) "Delson Thin Mints. Chocolate Covered * * * Delson Candy Co. * * * New York, N.Y."

RESULTS OF INVESTIGATION: Examination showed that the article was disc-shaped chocolate-covered mints packed in a single-layer, long, narrow, rectangular box, divided into 3 parts by means of built-in, hollow, cardboard dividers, with a similar hollow construction at each end which shortened the usable inside space.

LIBELED: 1-26-59, Dist. N.J.

CHARGE: 403(d)—when shipped, the container of the article was so filled as to be misleading, since the use of two hollow dividers between each section of candy and one hollow divider at each end of the container utilized the available space in the container so that the candy occupied only about 45 percent of the volume of a container of this size; such excess packaging material was unnecessary in the packaging of the article, and additional pieces of candy could be packed in the container with no physical difficulty.

DISPOSITION: On 3-5-59, Charles R. Adelson and Richard H. Adelson, general partners, and Jane L. Adelson and Ethel A. Schaper, limited partners, t/a Delson Candy Co., claimed the article and denied that the article was misbranded. On 5-6-59, upon application by the claimant and with the consent of the Government, an order was entered directing the United States marshal to store the article under refrigeration pending a final determination of the case. On 7-13-59, the Government served written interrogatories on the claimant. On 8-12-59, the claimant served written interrogatories on the Government. On 9-11-59, the claimant filed answers to the Government's interrogatories; and thereafter the Government filed answers to the claimant's interrogatories.

The case was tried on 1-6-60 through 1-8-60 before the court. On 2-10-60, the court rendered the following opinion:

WORTENDYKE, *District Judge*: "By its libel of information, the Government prayed seizure and condemnation of an article of food consisting of 174 cases, more or less, each containing 24 ten ounce packages of an article labeled in part 'Delson Thin Mints, Chocolate Covered * * * Delson Candy Company * * * Newark, New York * * *' [New York, New York.] Pursuant to warrant of seizure, 91 cases of the article were attached by the United States Marshal, who duly served upon the person in charge of the place where the goods were stored, a monition addressed to the owner thereof which was thereafter duly published. In due course a notice of claim was filed by

Richard H. Adelson, one of the partners trading as Delson Candy Company, in behalf of said firm, making claim to the articles attached and praying leave to defend against the complaint for condemnation.

"The proceeding is brought pursuant to the provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., and the complaint charges that the article seized was misbranded when introduced into and while in interstate commerce, within the meaning of the Act, 21 U.S.C. § 343(d), in that 'its container is so filled as to be misleading, since the use of two hollow dividers between each section of candy and one hollow divider at each end of the container utilizes available space in the container so that the candy occupies only about 45 percent of the volume of a container of this size * * *.' In part, the basis alleged for the condemnation sought is that the individual container of the candies is 'slack-filled' to a degree misleading to a prospective retail consumer.

"The pretrial order describes the article and containers as 'chocolate covered mint candies, in boxes containing less units of the product than the exterior dimensions of the box would otherwise permit, by separating by hollow cardboard partitions, portions of the product contained in the package.' The Government concedes that the net weight of claimants' candy contained in each package is as represented on the exterior of the package; it contends nevertheless that the use of such a container 'misleads the average intending purchaser into the assumption that the contents of the package is a maximum amount of individual mint discs which the interior cubic contents of the package would permit.' The Government also takes the position that it did not expect or require any such container to have its interior volume *completely* filled by the pieces of candy enclosed therein. Claimant admits the manufacture, packaging, and shipment in interstate commerce of the seized article, but denies that its packages were either intended to or in fact did deceive the public. On the contrary, claimant contends that the design of the container complained of was adopted solely for the purpose of affording a more efficient and protective package and that it constitutes a recognized advance in the art of candy box design. More specifically, the claimant asserts that the hollow dividers and the type of end structure in and of each of the candy boxes serves and was designed to function as a means of protecting the individual pieces of candy from the effects of pressure and shock in shipment. Both parties recognize that this case presents the single issue of whether the method of packaging employed by the claimant is misleading to the public generally.

"Besides denying that its container is misleading, claimant asserts that the provisions of § 343(d), as applied to claimants' container, would be unconstitutional if it were to be held to be misbranded. Claimants assert that the provisions of 21 U.S.C. § 343(d) are so vague, indefinite and uncertain as to permit the taking of claimants' property without due process of law, in violation of the Fifth Amendment of the United States Constitution. The issue of constitutionality of the statute invoked was argued to the Court preliminarily to the presentation of evidence upon the issues framed by the pleadings, but decision upon this preliminary question was reserved by the Court for determination after hearing all of the evidence. Where there is a possibility that a case may be disposed of on other than constitutional grounds, a constitutional adjudication must be deferred; it being the duty of a Federal Court to avoid an unnecessary decision of a constitutional question. *McLarty v. Borough of Ramsey*, D.C.N.J. 1958, 166 F. Supp. 291, *affd.* 3 Cir. 1949, 270 F. 2d 232.

THE ACCUSED CONTAINER

"Claimants' individual candies are, as stated, chocolate covered mints, circular in shape, having one side slightly convex and the opposite side flat. They are packed and sold in rectangular 'corset-type' boxes with the plane of the individual piece of candy at right angles to the long dimension of the container. The outside dimensions of each box, including the wrapper, are 11.56" x 1.94" x 1.75", comprising an exterior volume of 39.2 cubic inches, but an interior volume of the lower box in which the candies are packed of 30.8 cubic inches. The candy-carrying interior of the lower box is divided into three compartments by means of hollow transverse dividers of cardboard, and each end of that portion of the box consists of a hollow recess extending

longitudinally into and transversely across the interior. The aggregate volume of the two hollow dividers and the two hollow ends is 5.4 cubic inches. Each of these boxes contained a total of 30 candy mints,—ten in each of the three compartments or sections,—but not so snugly packed in each section as to preclude the addition of one mint to each compartment. The exterior of each box was marked with the correct net weight of the candy contents in readily legible characters, and the price charged for the box of candy was competitive with prices throughout the market for similar quantities of merchandise of like quality.

"It is readily apparent from inspection of the interior of any of claimants' filled boxes that the compartmentation of the box interior and the presence of the hollow dividers and exteriorly recessed ends, prevents all of the packed candies from becoming an undivided continuous mass, and also prevents the uninterrupted conduction of shock throughout such mass. Moreover, it is equally obvious from an inspection of the container that kinetic force applied to either end of the box, which would otherwise be conducted longitudinally throughout its length, is in some degree absorbed by the hollow ends and hollow partitions.

"There were placed in evidence during the trial, boxes of candies of like kind, generally similar exteriorly in shape to the containers herein accused, in some of which there were no interior compartmentation, nor any interiorly extending recess at either end, but in which each unit of candy was separated from others by a square sheet of waxed paper. Still another type of container for similar candy was in evidence, which provided a three-section interior compartmentation, by means of 'chocolate-board' (cardboard) partitioning without the hollow characteristics of the partitions and ends employed in the accused boxes. Much testimony was presented respecting the efficacy of the different types of boxes to protect the contained candy from damage in course of shipment; but in none of the types of containers presented to the Court in evidence was one hundred percent of the interior volume of the box occupied by candy. There was, moreover, evidence to the effect that the volume of each candy unit was affected by temperature as well as by the degree of freshness or staleness of the article. Thus, the extent of occupancy of the interior of the box, by the candy, was a variable dependent upon exterior circumstances.

"By removing the hollow ends and dividers, and using single thicknesses of cardboard to serve as dividers and to fill in the ends, a witness for the Government was able to add eleven mints to the contents of the lower box. This, of course, substantially increased the weight of candy in the package. Another Government witness, offered as an expert in surveying consumer opinion attitude, expressed the opinion that from twenty to twenty-five percent of retail consumer purchasers were influenced in selecting a commodity by the size of its package, rather than by its price. Another Government witness testified that he purchased a box of Delson Thin Mints, shortly before the trial, at a self-service supermarket in New York City, and that in selecting the package he noticed that it was price-marked 35¢. As he emerged from the place of purchase, he was interviewed by an investigator for the Federal Food and Drug Administration, who had observed him making his purchase. The investigator opened a package of Delson Thin Mints in the presence of this witness, and upon being asked whether he found in the package what he had anticipated, he testified that he had expected to see far more mints in the package than there were shown to be. Several other witnesses testified for the Government to a similar effect, respecting similar experiences. A Doctor of Philosophy in psychology testified for the Government that he had presented to a succession of individuals samples of types of candy boxes generally similar exteriorly to the package of Delson, and found that each of these persons tended to over-estimate, before opening, the number of pieces of candy contained in each box. Upon these findings this witness concluded that in making judgments of contents from an external observation of the package, the length of the box exerted a greater influence upon the judgment of the estimator than did the indicated net weight of the contents. Another Doctor of Philosophy, university professor and author in the field of economics, expressed the opinion that claimants' container was a slack-filled container because it was possible for it to hold more pieces of candy than were found to be therein contained. Testimony was also adduced both by the Government and by the claimants respecting the efficacy of the hollow partitions and ends in claimants' boxes,

in reducing the hazard of crushing and shock damage to the candy contained in their package.

"For the claimants the testimony of a consultant on industrial package design testified that the controlling criteria governing the selection of a form of package are principally two in number, viz: (1) trade and consumer acceptance; and (2) protection of the product contained therein. It was the opinion of this witness that the hollow partitions and ends were intended for and did achieve the protection of the contents against end-to-end and side-to-side shock. The designer of the Delson package testified that the form and construction adopted was for the purpose of eliminating breakage, and that he was aware of no intention on the part of claimants to mislead the purchaser by the use of that form of box.

"From the evidence I conclude that the type of container construction employed by the claimants, which the Government accuses in this case, is efficacious to a degree for the protective purposes contended for by the claimants and was not adopted and is not being used for the purpose of deceiving prospective purchasers respecting the contents of the container. I further find that similar interior box construction is employed by two other nationally known manufacturers of chocolate mint candies.

"The facts in this case are generally similar to those in *United States v. Cataldo*, 1 Cir. 1946, 157 F. 2d 802, which affirmed the action of the District Court in dismissing a libel brought under the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. § 301, et seq., for the condemnation of cartons of boxes of candy shipped in interstate commerce. The libel there charged that the food was misbranded within the meaning of § 403(d) of the Act (21 U.S.C.A. § 343(d)), in that the container was so formed and filled as to be misleading, because the boxes could hold approximately fifty percent more candy than was found therein. In this case, each box measured 1¼" in width by 2" in length, and about 1" in depth, and contained one piece of candy, a half-ounce in weight. Each piece of candy was wrapped with a piece of card wafer and measured approximately 1" in width, 1⅞" in length, and a half-inch in depth. The Appellate Court stated that the question presented was 'whether the containers of the article were so made, formed or filled as to be misleading.' The evidence on the trial in the cited case disclosed that the average dimension per piece of candy was 1.05 cubic inches, the internal volume of the small container was 2.32 cubic inches, and the commodity occupied 45.3 percent of the entire volume of the carton. At page 804 of the opinion of the Court in *Cataldo*, we are reminded that 'Whether or not over 50 percent space in a particular package of candy was slack-filling is a question of fact for the District Court to decide.' The opinion recites, with apparent approval, a statement of the District Judge that 'it would be "stretching the statute all out of proportion to its purpose if it were to find on the evidence in this case, dealing with this particular nougat, the way it is shaped and wrapped, that the container was so made, formed or filled as to be misleading," and that there was nothing "in the shape and size of the larger package or the smaller packages that would be misleading to a person."' The District Court was, therefore, affirmed in its conclusion that it could not be said as a matter of law, either that the product had been misbranded, or that its container had been so made, formed or filled as to be misleading.

"In another similar case, *United States vs. 116 boxes, etc., Arden Assorted Candy Drops*, D.C. Mass. 1948, 80 F. Supp. 911, the Government unsuccessfully sought condemnation of packages of candy charging misbranding under § 403(d) of the Act. In that case also the package was accused of being slack-filled, where, as a result of the settlement of the contents there was an average air space left in the box after filling of 33⅓ percent. There was no evidence as to how many pieces of candy any consumer would expect to receive from a box of the type complained of. The District Judge there concluded, as a matter of law, that the seized shipment did not violate the Act and that the libel should be dismissed. The Court in that case said, (page 913): 'The question whether the package is misleading is a question of fact. And the standard is not whether experts or men of peculiar training, experience, shrewdness or sophistication would be misled * * *. The standard is whether the container would be likely to mislead the ordinary purchaser of this type of merchandise, not one who was particularly attentive or prudent * * *. In the case at bar no evidence was introduced as to what an ordinary non-infantile purchaser

would expect. But in my view, he would not expect any particular number of lozenges. So long as he received ordinary lozenges not obviously so eccentric in shape as to result in peculiar packaging difficulties, and so long as he received approximately as many of these lozenges as could conveniently be packed in a standard rectangular carton by machine, he would not, in my opinion, be misled.'

"In the case at bar, despite the evidence which indicated that certain purchasers of the accused containers were 'surprised' to find when boxes were opened that there were not more candies therein, and despite the psychological effect of length or size of container upon the inclination of a consumer to purchase a food product, I am not persuaded by the evidence in this case that the Government has carried the burden of proof cast upon it, that the seized articles are misbranded under the section of the statute relied upon. The case is, in my opinion, lacking in adequate proof that the average adult, of normal intelligence, would be induced by the exterior appearance of the accused containers to buy a box of Delson mints with the expectation that it would contain any particular number of individual candies. The evidence in this case is overwhelmingly persuasive that the exigencies of machine filling, handling and shipping of separate pieces of candy in interstate commerce require that less than the total interior volume of the box in which they are contained be occupied by the candies. The accused method of packaging here under consideration involves, within the container, spaces unoccupied by candy. It also appears that the boxes of claimants' candy in evidence, of which the Government complains, would permit the inclusion of more pieces of candy than they customarily contain. The net weight of candy in each package however is disclosed on the exterior thereof, and there is no evidence that the retail price charged for the box of the candy is disproportionate to the net weight nor inappropriate to the quality of the contents. I fail to find in the evidence that the containers used by the claimants are made, formed or filled in such a manner as to be misleading within the contemplation of 21 U.S.C. § 343(d).

"In view of the foregoing findings and conclusions, which shall be deemed compliance with F.R.C.P. 52, it becomes unnecessary to consider the constitutional question upon which decision was reserved at the trial. I, therefore, conclude that the seized articles are not misbranded, and direct that they be restored to the claimants, and that the libel herein be dismissed.

"An appropriate order may be presented according with the views herein expressed."

Thereafter the Government appealed to the United States Court of Appeals for the 3rd Circuit and, on 2-28-61, the following opinion was rendered:

Biggs, *Chief Judge*: "This is an appeal by the United States from an order of the United States District Court for the District of New Jersey dismissing a libel of information against a number of cases of chocolate covered thin mints manufactured and shipped by the appellee-claimant, Delson Candy Company, in the spring of 1958.

"Under Section 403(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. § 343(d), food must be held to be misbranded 'if its container is so made, formed or filled as to be misleading.' The standard set up by Judge Wyzanski in *United States v. 116 Boxes Etc.*, 80 F. Supp. 911, 913 (D. Mass. 1948), is 'whether the container would be likely to mislead the ordinary purchaser of this type of merchandise . . .' We think this standard is the correct one.

"The opinion of the court below, 180 F. Supp. 863, sets out fully the size, arrangements, and physical set-up of the chocolate-mint boxes which are the subject of the suit. It sums up the evidence of the United States that the containers were so slack-filled as to be misleading and that their structure rendered them no more effective but perhaps less effective in safeguarding their contents than less misleading forms and also the claimant's evidence that its containers were a more efficacious safeguard for its product than other less deceptive containers would have been.

"There are two ways in which a trial court may hold for the claimant in cases such as that at bar. First, the court can find as a fact that the accused package is not made, formed, or filled in such a way that it would deceive the ordinary purchaser as to the quantity of its contents. See *United States v. Cataldo*, 157 F. 2d 802 (1 Cir. 1946); *United States v. 116 Bowes, Etc., supra*. Alternatively, the court may find as a fact that even though the form or filling of the package deceives the ordinary purchaser into thinking that it contains more food than it actually does, the form and filling of the package is justified by considerations of safety and is reasonable in the light of available alternative safety features.

"Did the district court in the present case make either of these findings? We conclude that it did not do so.

"First, the court below did not find that the Delson package did not deceive the ordinary purchaser by making him think that it contained more than it actually did contain. The court stated in respect to this issue: 'The case is, in my opinion, lacking in adequate proof that the average adult, of normal intelligence, would be induced by the exterior appearance of the accused containers to buy a box of Delson mints with the expectation that it would contain any particular number of individual candies.' 180 F. Supp. at p. 868. This statement is beside the point. The question was not whether the ordinary purchaser would expect to find a particular number of individual candies in the box but whether such a purchaser would expect to find more of the Delson box filled. For example, the purchaser of a crate of apples opens the crate and finds it half filled. To determine whether he was deceived we do not ask whether he expected to find a particular number of individual apples in the crate. We do ask whether he expected to find more of the crate filled. This is the pertinent question. People do not think in terms of the number of individual mints when buying them in containers.¹

"As to the second issue we point out that evidence introduced by the United States tended to show that only 44% of the total volume of the accused container and that only 75% of its practical volume was filled with mints; that the remainder of the usable space was taken up with hollow cardboard dividers and hollow end pieces. The United States introduced substantial uncontradicted evidence to show that purchasers of the mints, opening the boxes, expected to find far more mints in them than were there. In view of this it is obvious, if there were nothing more in the case, that the containers might well fall within the interdiction of the statute.

"But, and this is a point which we must emphasize, a showing by the United States that the ordinary purchaser, on viewing a container, will believe that it contains significantly more food than in fact it does contain, and was deceived, cannot be dispositive of the issues of such a case as that at bar. A claimant may go forward and show, as the claimant has attempted to do here, that the circumstantial deception was forced upon it by other considerations such as packaging features necessary to safeguard its product. But safety considerations, before they can be held to justify a slack package must be shown to be reasonably necessary in the light of alternative methods of safeguarding the contents. For example, some padding is obviously necessary in egg crates to safeguard the eggs. But, a two-inch cotton cushion between each of the eggs would certainly not be justified even though such excessive padding would serve fully the ends of safety. The deception would outweigh the asserted justification of safety when viewed in the light of a more reasonable alternative such as cardboard dividers.

"The trial court did not make any finding that the Delson slack package was justified by considerations of safety. The court stated only: 'From the evidence I conclude that the type of container construction employed by the claimant[s], which the Government accuses in this case, is efficacious to a degree for the protective purposes contended for by the claimant[s] and was not adopted and is not being used for the purpose of deceiving prospective purchasers respecting the contents of the container.' 180 F. Supp. at p. 867.

¹ We think that the court's misconception of the issue derives from language employed in *United States v. 116 Bowes, Etc.*, 80 F. Supp., 911, 913 (D. Mass. 1948).

The court did find that the container is 'efficacious to a degree'.³ But this is not enough. The court has to find that the container's efficacy outweighs its deceptive quality."

Thereafter the matter was remanded to the United States District Court, Dist. N.J., in accordance with the foregoing opinion, both parties filed briefs, and, on 5-29-61, the matter was argued before that court. On 6-26-61, the following findings of fact and conclusions of law were filed:

FINDINGS OF FACT

WORTENDYKE, *District Judge*: "On appeal from this Court's order of February 23, 1960 dismissing the Government's libel of information in this case, the Court of Appeals, 287 F. 2d 246 (1961), vacated the judgement and remanded 'with the direction to proceed as the facts and the law require' because of this Court's failure to make the necessary findings of fact to support the legal conclusions which it reached. This Court's opinion in lieu of findings of fact and conclusions of law (F.R.C.P. 52) was filed February 10, 1960, and is reported at 180 F. Supp. 863. The Court of Appeals concluded that this Court failed to make either of the following findings: (1) 'that the accused package is not made, formed, or filled in such a way that it would deceive the ordinary purchaser as to the quantity of its contents;' (2) 'that even though the form or filling of the package deceives the ordinary purchaser into thinking that it contains more food than it actually does, the form and filling of the package is justified by considerations of safety and is reasonable in the light of available alternative safety features.' As the present writer reads the appellate Court's opinion, one or the other of the foregoing findings of fact is a *sine qua non* to a conclusion of law that claimant's container was not misbranded under 21 U.S.C. § 343(d).

"In compliance with the directive of the United States Court of Appeals for the Third Circuit, I find the following facts in this case:

"1. Claimant's chocolate covered thin mints are approximately circular, but, unlike competitor's mints, are dome-shaped, with one side convex and the other side flat, measuring approximately 1.5 inches in diameter and .28 of an inch in thickness.

"2. The accused package or container in which the mints are packed is a rectangular cardboard box, the outside dimensions of which, inclusive of the wrapper, are 11.56" x 1.94" x 1.75", comprising an exterior volume of 39.2 cubic inches.

"3. There are three compartments or sections of mints in the accused package or container, and each compartment contains ten units, standing on edge in a horizontal row, or 30 mints in all per box.

"4. Each compartment of the accused package is separated by hollow transverse dividers of cardboard which, in the process of manufacturing the box, are stamped from a cardboard sleeve and locked or anchored in place by tabs coming up from the bottom; and each end of the box has a hollow recess extending longitudinally into and transversely across the interior.

"5. The aggregate volume of these dividers and the ends is 5.4 cubic inches.

"6. The slack in the accused packages would permit the addition of one more mint in each of the three compartments of the box, but this is a normal amount of slack, and it exists in the three compartments of the A. & P. Tea Company's 'Warwick' package of chocolate covered thin mints which the Government sought to contrast favorably over claimant's package.

³ The court also said: "The evidence in this case is overwhelmingly persuasive that the exigencies of machine filling, handling and shipping of separate pieces of candy in interstate commerce require that less than the total interior volume of the box in which they are contained be occupied by the candies. The accused method of packaging here under consideration involves within the container, spaces unoccupied by candy" 180 F. Supp. at p. 868. This statement is fully supported by the evidence but it cannot carry the case for the claimant. The United States does not argue that the box had to be packed tight. It had argued that Delson mints could have been packed tighter and yet could have been safe, while not misleading the consumer.

Further, it has to find that the available alternative efficacious means are not less deceptive than those actually employed.

Since the court below has not made the necessary findings of fact to support the legal conclusions which it has reached, we will vacate the judgment and remand with the direction to proceed as the facts and the law require.

"7. Having in mind that the accused container is rectangular and that the mints are approximately circular, 83% of the practical volume of the package is filled with mints.

"8. If the accused package were stripped of its dividers and ends, there would be room for six more mints.

"9. Only about 25% of those interviewed by a market research concern used by the Government were motivated in their choice of packages by size rather than price.

"10. A survey of purchasers of various packages of chocolate covered mints, including the A. & P. Tea Company's 'Warwick' package, which uses single-thickness cardboard dividers, showed that the public grossly overestimated the number of mints in all of the packages.

"11. The only purchasers of claimant's package called as witnesses by the Government were Willock, Zucker, Grosso and Calistro, each of whom after purchasing claimant's package, was interviewed by a Food and Drug Administration employee.

"12. It was not shown how many other purchasers of claimant's package were interviewed by the Food and Drug Administration nor was there any evidence that the reactions of these witnesses to the package were typical.

"13. Some of these witnesses were 'surprised' to see dividers in the box, or 'disappointed' in the amount of candy in the box; some had no idea how many mints they expected to find in the package; others expected to find only as many mints as were indicated in the net weight marked on the outside of the box; all would have been displeased on opening the package to have found the mints broken or crushed. One of these witnesses who had not expected to find the dividers in the box, admitted that he had not been deceived a short time previously when he purchased a box of Terry chocolate covered thin mints, although it was shown that the Terry box also uses hollow dividers. He did not feel misled by a demonstration package of the same size, with the mints packed flat in four layers, although it actually contained two less mints than the accused package. Another of these witnesses admitted that his idea as to the number of mints came simply from the stripes on the box wrapper.

"14. Three out of four of the largest manufacturers of chocolate covered thin mints in this country pack them in containers using hollow rather than single-thickness dividers. Hollow double-wall packaging is also widely used for other products in addition to chocolate covered thin mints.

"15. The Government admitted in its answers to interrogatories that it had no record of any member of the public being deceived by the accused container; that it had received no complaints about the container from any city, county or state, or other local regulatory officials; and that the only complaint it had received concerning the container was from Deran Confectionery Co., a competitor of claimant. Claimant itself also received no complaints concerning the accused package during the years it has been in use. Sales of the accused package have increased in those years.

"16. The correct net weight of the candy is disclosed on the wrapper of the accused package, and there is no evidence that the retail price charged for the package is disproportionate to the net weight or inappropriate to the quality of the contents. The claimant has acted in good faith, with no intent that the package should mislead purchasers.

"17. The accused package is not so made, formed or filled as to deceive the ordinary purchaser as to the quantity of its contents. It is not misleading or misbranded.

"18. Chocolate covered thin mints have always presented very difficult and troublesome handling problems in the industry. Claimant's chocolate covered thin mints, being dome-shaped rather than flat on both sides, are even more fragile than most of those of its competitors. They are shipped all over the United States and to Canada, in trucks with other freight—at times with heavy hardware, steel pipes, and the like—and are subjected to frequent transshipment, reshipment and interchange, all necessitating a very strong package. A. & P.'s 'Warrick' packages of mints are shipped directly to the points of destination, most of which are East of the Mississippi River, only to A. & P.'s own stores, and deliveries are customarily suspended during periods of hot weather, thereby giving A. & P. a high measure of control over its product. Claimant's distribution is carried on throughout the year, to many different types of handlers such as candy wholesalers, grocery wholesalers, drug chains

and drugstores, and claimant's control over its product is consequently more limited than is that of A. & P.

"19. The accused package is filled by hand, but other steps in the manufacturing process are performed by machine. The wrapping of the boxes is done by a machine which cuts a foil wrapper from a roll, positions it, and then, by means of devices in the machine, conforms the completed wrapper so that when it comes out of the wrapping machine, the package is ready to go into the shipping carton. During this machine-wrapping process the package is rigidly held and pressure is exerted upon it as the foil wrapping is held on the box so that the printing may be precisely registered.

"20. In the packaging of chocolate covered thin mints it is necessary to compartmentize them in order to protect them from breakage. The A. & P. 'Warwick' box also has three compartments for holding the mints, and there is one and one-half inches of slack in its package. Some slack is necessary in such a package to protect the contents in shipping.

"In 1934 when claimant first began to manufacture chocolate covered thin mints, they were, as in the accused package, packed in a long, narrow or corset-shaped box, with the mints standing on edge in a row, but at that time the mints were separated individually only by pieces of waxed paper. With this type of packaging, with shipments being made to greater distances, breakage was occurring and in an endeavor to correct this, claimant added a three-part divider. Despite this addition, the breakage continued, and after a temporary period during the war when claimant made a higher priced package in which the mints were packed flat, claimant adopted, in 1950, a long corset-shaped eight-ounce box. Because its competitors adopted a larger size corset-shaped box, claimant, in or about 1954, replaced its 8-ounce package with a longer corset-shaped box containing twelve ounces of mints, but having four compartments. This package was similar to the one then in use by Deran. This box also proved unsatisfactory and breakage of the mints continued. Claimant next employed a long box with a three-part divider, which had three 'necks' of corrugated glassine paper, holding a net weight of ten ounces of candy. Although there were 36 mints in that box, they were smaller in size than claimant's present product. That package also proved unsatisfactory after use for only about a year; claimant found that twelve mints in each of the three compartments were too many to permit safe shipment, because he continued to receive complaints from consumers of breakage. In 1956 claimant changed to a hollow divider type of package, similar to one which its competitor Terry had adopted, and holding 30 mints, but by making each piece of candy larger than the former size, the aggregate weight of the contents remained the same—10 ounces. This package also proved unsatisfactory because, with no lateral support for the sides of the dividers, the mints tended to slip beneath the base of the dividers, with consequent breakage and claimant continued to receive complaints.

"20. Claimant submitted its packaging problem to Paramount Carton Corporation, experts in the designing and manufacturing of boxes, who then designed the accused package. The objective which Paramount sought to attain was to produce a box of strong construction which could be manufactured economically and conveniently.

"21. In the various stages of the transition of claimant's package since 1954, the consumer has received exactly the same quantity of candy, that is, 10 ounces in each package. The accused package is stronger and more economical to manufacture than were the preceding packages used by claimant.

"22. In the Government's pressure-machine tests of the accused package, and of competing Deran and 'Warwick' packages, the accused container withstood greater lateral compression in the side-to-side test, but less vertical compression, than either of the other packages. In those tests the candy in the accused package was not damaged in the end-to-end test, even after the package itself reached the failure-point in its resistance to the machine compression.

"23. The hollow ends of the accused container have the functional purpose of absorbing the shock, holding the mints in a set solid position to prevent breakage. The type of divider used in the accused package, being anchored or locked to the bottom of the box, acts as a protective buttress. These hollow ends and dividers serve a functional and utilitarian purpose by affording a greater degree of crush resistance and shock protection than would single-thickness cardboard dividers and ends. The double surface of the walls of

the dividers provides a better cushion for the mints, and the double thickness of the bottom helps to prevent melting from the heat which is employed in the machine-wrapping process. The accused package is better able to deliver the merchandise to the consumer in good condition than is one with single-wall dividers. The accused container can be more economically produced, using a straight line gluing machine of the fastest type available, and producing boxes at the rate of 100,000 a day.

"24. Other manufacturers using single-thickness dividers in packaging chocolate covered thin mints also experienced breakage, and received complaints, even where the boxes contained only eight ounces of mints.

"25. Utilizing a container the same size as that here accused, packing mints flat rather than on edge, only four layers of seven mints each will fit therein if packed to afford reasonable safety in shipment, and the aggregate of 28 mints thus packed would total only 9½ ounces, as compared with the 10 ounces of weight of the thirty mints which claimant packs in the accused package.

"26. The Government's witnesses considered filled a box the same size as the accused container when it contained four layers of seven mints each, despite the fact that it actually contained two less pieces of candy than were packed in the claimant's accused container, and one-half ounce less in weight.

"27. Packages using single-thickness dividers and ends cannot be manufactured with the speed and economy of the accused package, nor have they proven as satisfactory in use. The available alternative means of packaging claimant's chocolate covered thin mints are not less deceptive than those actually employed in the accused package.

"28. The efficacy of claimant's accused package both from the standpoint of protecting the contents and from the standpoint of economy of manufacture, outweighs its alleged deceptive quality.

CONCLUSIONS OF LAW

"1. Claimant's accused package is not misbranded or misleading within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 et seq., and is not in violation thereof.

"2. If applied to bar the use of the accused package, § 403(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 343(d), is unconstitutionally vague, indefinite and uncertain, and contravenes the due process clause of the Fifth Amendment of the Constitution of the United States. *United States v. Cohen Grocery Co.*, 1921, 253 U.S. 81; *Penobscot Poultry Co. v. United States*, 1 Cir. 1957, 244 F. 2d 94.

"3. Claimant is entitled to have restored to it the goods which were seized by the United States Marshal in this proceeding.

"4. The libel filed in this proceeding should be dismissed.

"An order may be presented in conformity with the view hereinabove expressed."

The Government again appealed the decision of the district court, and on 3-20-62, the Court of Appeals for the 3rd Circuit heard the matter. On 4-16-62, the Court of Appeals rendered the following opinion (302 F. 2d 724):

PER CURIAM: "This is an appeal from a decision of the District Court for the District of New Jersey dismissing a libel against a number of cases of chocolate covered mints manufactured by the Delson Candy Company. The libel is based upon the charge that the packaging of Delson Mints is so slack that the purchasing public is deceived and that the packaging used by Delson does not serve such functional usefulness as to justify the form of package adopted.

"The case has been here once before. See *UNITED STATES v. 174 CASES, ETC.*, 287 F. 2d 346 (1961). The opinion of the Court, by Chief Judge Biggs, outlined the manner in which a trial court could and should make findings of fact on the issues involved. The case was sent back to the trial court for this purpose.

"The trial court, pursuant to the directions of this Court, did make findings and made them in detail. The conclusion based on those findings is that the libel should be dismissed. 195 F. Supp. 326 (1961).

"Bearing in mind that our function in such a case is not to reverse the trial court unless the fact conclusions are clearly erroneous, we shall affirm in this instance. The findings were responsive to the questions involved. They were based upon consideration of a large amount of testimony. Whether we would agree with each one had we the initial responsibility is not the point here. The sustaining of the findings because not clearly erroneous is, of course, no foundation for a similar conclusion in cases presenting other questions of fact.

"The judgment of the district court will be affirmed."

On 12-10-62, the district court ordered that the article be restored to the claimant on 12-21-62, and that from that date the claimant should be in exclusive possession and control of the article and should bear all subsequently accruing costs for the storage of the article. It was further ordered that the libel of information filed on 1-26-59 be dismissed with prejudice but without costs. On 12-21-62, the article was delivered to the claimant.

29131. Deran thin mints. (F.D.C. No. 43281. S. No. 44-802 P.)

QUANTITY: 172 ctns., each containing 24 10-oz. boxes, at Atlanta, Ga.

SHIPPED: Between 3-5-59 and 4-13-59, from Cambridge, Mass., by Deran Confectionery Co., Inc.

LABEL IN PART: (Box) "Deran's Thin Mints * * * Chocolate Covered Deran Confectionery Co., Inc., Cambridge, Mass."

RESULTS OF INVESTIGATION: Examination showed that each box contained 28 round, chocolate-covered mints which were packed in a two-piece, rectangular cardboard box, the lower part of which was lined with corrugated paper and was separated into three equal parts by means of built-in, hollow, cardboard dividers, with a similar hollow construction at each end.

LIBELED: 6-25-59, N. Dist. Ga.; amended libel 9-18-59.

CHARGE: 403(d), when shipped, the container of the article was so filled as to be misleading, since the use of hollow dividers between each section of candy and a hollow divider at each end of the container utilized available space in the container so that the candy occupied only about 65 percent of the volume of a container of this size; such excess packaging material was unnecessary in the packaging of this article, and additional pieces of candy could be packed in the containers with no physical packaging difficulty.

DISPOSITION: On 7-22-59, Deran Confectionery Co., Inc., filed an answer denying that the article was misbranded and that the use of dividers was unnecessary in the packaging of the article; claimant also moved that the libel be dismissed.

On 9-18-59, the Government filed a motion to amend the libel and served written interrogatories on the defendants. On 12-10-59, the claimant's motion to dismiss was overruled and denied. On 12-14-59, an order for the release of samples to the Government and claimant was filed. On 8-12-62, claimant answered the interrogatories served by the Government. On 1-17-63, the court, with the consent of the Government and the claimant, entered an order which dismissed the action upon motion of the Government without prejudice to the Government's right to have the action reinstated after a final decision in a case entitled: "*United States of America v. 174 cases . . . of an article labeled in part: Delson Thin Mints Chocolate Covered,*" and which directed the marshal to retain the custody of the article until otherwise directed by the United States attorney. On 1-17-63, the libel having been dismissed and the claimant having failed to post bond or pay any costs, the court ordered that